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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

HENRY ARTHUR DRAKE,

Petitioner,

-v-

WALTER ZANT, WARDEN,
Georgia Diagnostic &
Classification Center,

Respondent.

CASE NUMBER 79-6615

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Petitioner, HENRY ARTHUR DRAKE, who is now confined in the Georgia Diagnostic Center in Jackson, Georgia, under a sentence of death, asks leave to file the attached Petition for Writ of Certiorari to the United States Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Petitioner's Affidavit in support of this motion is attached hereto.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH,
MARTIN & CATTS, P.C.

BY Edward T. M. Garland by Mary J. Wilkes
EDWARD T. M. GARLAND, Esq.

BY Mary J. Wilkes
MARY J. WILKES, Esq.

1012 Candler Building
Atlanta, GA 30303

(404) 577-2225

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HENRY ARTHUR DRAKE, Petitioner,	:	
-v-	:	CASE NUMBER 79-6615
WALTER ZANT, WARDEN, Georgia Diagnostic & Classification Center, Respondent.	:	

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF GEORGIA)
(ss:
COUNTY OF BUTTS)

I, HENRY ARTHUR DRAKE, Petitioner, hereby state under oath, the following:

1. I am a citizen of the United States of America and the Petitioner in the above-entitled action.

2. I desire to seek a review of the judgment entered by the Supreme Court of Georgia on February 19, 1980, denying a rehearing of a Certificate of Probable Cause which was itself denied on January 25, 1980, pursuant to 28 U.S.C. Sec. 1257 (3), but because of my poverty, I am unable to pay the costs of such a review or to provide security.

3. I believe I am entitled to the redress I seek by such a review, and that such a review presents substantial issues of deprivation of rights secured by the Constitution of the United States.

The nature of the questions to be presented upon such a review are set out in the accompanying Petition for Writ of Certiorari.

I contend that the Supreme Court of Georgia erred in refusing to grant my Certificate of Probable Cause.

WHEREFORE, Petitioner respectfully prays that he may have leave to proceed in this Court on Petition for Writ of Certiorari in forma pauperis.

FURTHER AFFIANT SAYETH NOT.

Henry Arthur Drake
HENRY ARTHUR DRAKE

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 8th DAY OF MAY 1980.

Wm M. Warner
NOTARY PUBLIC STATE OF GEORGIA
AT LARGE

My Commission Expires:

Notary Public, Georgia State at Large
My Commission Expires Jan. 12, 1982

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WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CORRECTIONAL CENTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

EDWARD T. M. GARLAND
MARY J. WILKES

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404/ 577-2225

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I. WHERE THE FACTS OF THE CASE WERE SUCH THAT ONLY ONE PERSON COULD HAVE BEEN THE ACTUAL PERPETRATOR OF THE KILLING AND THE SPECIAL PROSECUTOR HAD PREVIOUSLY OBTAINED A DEATH SENTENCE IN THE SEPARATE TRIAL OF THE CO-DEFENDANT BY REPRESENTING TO THE JURY IN THAT CASE THAT IT WAS THE CO-DEFENDANT WHO WAS THE ACTUAL PERPETRATOR OF THE KILLING, WHETHER IT WAS A VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS FOR THE SAME SPECIAL PROSECUTOR TO REPRESENT TO THE JURY AT PETITIONER'S LATER TRIAL THAT IT WAS THE PETITIONER AND NOT THE CO-DEFENDANT WHO WAS THE ACTUAL PERPETRATOR OF THE KILLING. 11

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner HENRY ARTHUR DRAKE respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia denying an application for a Certificate of Probable Cause from the denial of his Petition for a Writ of Habeas Corpus by the Superior Court of Butts County, Georgia said Habeas Petition having been filed to seek review of his conviction of murder and armed robbery.

OPINIONS BELOW

In June of 1978 the Supreme Court of Georgia issued an opinion at 241 Ga. 583, affirming Petitioner's convictions of murder and armed robbery. (Copy attached as Appendix A). On December 14, 1979 the Superior Court of Butts County, Georgia entered an Order denying a State Petition for Writ of Habeas Corpus. (Copy attached as Appendix B). On January 25, 1980 the Georgia Supreme Court issued an Order denying the application for a Certificate of probable cause from the Habeas decision (copy

attached as Appendix C); and on February 19, 1980 the Georgia Supreme Court issued an Order denying a Motion for the Rehearing of that Application for Certificate of Probable Cause. (Copy attached as Appendix D).

JURISDICTION

Jurisdiction of the appeal is grounded in the December 14, 1979 order of the Superior Court of Butts County denying the Petition for Writ of Habeas Corpus; the denial of the Application for a Certificate of Probable Cause by the Georgia Supreme Court on January 25, 1980; and the February 19, 1980 denial of a Motion for Rehearing of that Application by the Georgia Supreme Court.

The jurisdiction of the Supreme Court is invoked pursuant to this Court's ability to review and decide any title, right, privilege or immunity specifically set up or claimed under the Constitution of the United States. 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

I. Where the facts of the case were such that only one person could have been the actual perpetrator of the killing and the special prosecutor had previously obtained a death sentence in the separate trial of the co-defendant by representing the jury in that case that it was the Co-Defendant who was the actual perpetrator of the killing, whether it was a violation of Petitioner's Due Process Rights for the same special prosecutor to represent to the jury at Petitioner's later trial that it was the Petitioner and not the Co-Defendant who was the actual perpetrator of the killing.

II. Whether Petitioner's right to due process of law was violated by the prosecutor's use of prejudicial and inflammatory argument in the presence of the jury under the guise of those comments being directed to the court.

III. Whether one of the statutory "aggravating circumstances" upon which the jury relied in deciding upon death is so overbroad and vague that Petitioner's sentence based upon this statutory provision was unconstitutional?

IV. Whether in order for a jury charge to be unconstitutionally burden-shifting under Sandstrom v. Montana, _____U.S._____, 61 L.Ed. 2d 39, 99 S. Ct. (1979), the charge must create a conclusive presumption.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the Fifth and Eighth Amendments and the first section of the Fourteenth Amendment to the Constitution of the United States which provide as follows:

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV (Section 1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case involves Article 1, Section 1, Paragraph 1 of the Constitution of Georgia of 1976 which provides as follows:

Art. I, Sec. I, Paragraph I: (Ga. Code Ann. §2-101)

> No person shall be deprived of life, liberty, or property, except by due process of law.

This case also involves Sections 26-501, 26-604, 27-2534.1(b)(7), 27-2537(c)(1) and 70-207 of the Georgia Code Annotated, which provide as follows:

Section 26-501, Presumption of innocence and proof beyond reasonable doubt:

> Every person is presumed innocent until proved guilty. No person shall be convicted of a crime unless each element of such crime is proved beyond a reasonable doubt.

Section 26-604, Consequences presumed intended:

> A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

Section 27-2534.1, Mitigating and aggravating circumstances; death penalty:

> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Section 27-2537, Review of death sentences:

> (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial

court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense. and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) . . .

Section 70-207, Requests to charge; time for objections; time for presentation of request; disposition of refused requests; appellate review of erroneous charges with or without objection:

(a) Except as otherwise provided in this section, in all civil cases, no party may complain of the giving or the failure to give an instruction to the jury, unless he objects thereto before the jury returns its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury, and objection need not be made with the particularity of assignments

of error (abolished by this law) and need only be as reasonably definite as the circumstances will permit. The provisions of this section shall not apply in criminal cases.

(b) In all cases, at the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may present to the court written requests that it instruct the jury on the law as set forth therein. Copies of requests shall be given to opposing counsel for their consideration prior to the charge of the court. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but shall instruct the jury after the arguments are completed. The trial judge shall file with the clerk all requests submitted to him, whether given in charge or not.

(c) Notwithstanding any other provision of this section, the appellate courts shall consider and review erroneous charges where there has been a substantial error in the charge which was harmful as a matter of law, regardless of whether objection was made hereunder or not. (Emphasis added)

PREFATORY STATEMENT

All references to the trial transcript in this case will be preceded by the capital letter "T" followed by the page reference, e.g. "T.3". All references to the transcript of the Co-Defendant's trial will be preceded by the capital letters "CT" followed by the page reference, e.g. "C.T. 3". All references to the appendices will be preceded by the capital letter of the particular appendix followed by the page reference, e.g. A-3.

STATEMENT OF THE CASE

Petitioner HENRY DRAKE was tried and convicted for the armed robbery and murder of a 74 year old barber. Petitioner was 33 years old at the time the barber was killed. (T.404).

a) Facts

On the evening of December 5, 1975, Petitioner, accompanied by his girlfriend Mary Carruth and acquaintance, William Campbell, a man in his sixties who was living with Drake and Carruth at the time (T. 157-159) drove from Madison, Georgia, where the three were living at the time into Colbert, Georgia (T. 161-162) where Petitioner's mother and other family members resided. (T. 407). Petitioner and his girlfriend let Campbell out across from the barbershop in Colbert so that he could get a haircut (T. 161-162 and T. 380, 409) while they continued on to Petitioner's mother's house (T. 410-411).

At about 5:00 p.m. Campbell was observed leaning on a car outside the barbershop (T. 283-284). At 6:00 p.m. he was no longer outside but the lights in the barbershop were on. (T. 284).

At 9:00 p.m. that evening Mr. C. E. Eberhart, age 74, was found lying critically wounded on the floor of his barbershop. (T. 290). He had received blows to the head from a claw hammer and a stab wound. (T. 149-150). The floors and walls of the barbershop were smeared with blood as though an extended struggle had taken place. (T. 290, T. 307). Mr. Eberhart was hospitalized but remained in a coma until his death several months later on March 23, 1976. (T. 152-155).

Several days after the attack on Mr. Eberhart law enforcement officers went to the home of Petitioner Drake, where Campbell had been staying, to search for Campbell and possible evidence. (T. 122, 309, 358, 360). Campbell was gone but a watch later identified as belonging to Mr. Eberhart was found in Campbell's room in a dresser with Campbell's clothes and papers. (T. 129, 133, 322). Subsequently Petitioner was arrested. Campbell was also arrested after he was located in Virginia. He had been arrested there for shooting a woman during a robbery (only one week after the attack on Mr. Eberhart. (T. 195, 197).

Petitioner Drake was originally indicted along with Campbell but due to a challenge to the Grand Jury made by Drake's appointed attorneys he was reindicted and his case did not go to trial until one year after Campbell had been tried and convicted of the murder and armed robbery of Mr. Eberhart.

At his own trial Campbell claimed that he was innocently getting a haircut from Mr. Eberhart on the night Eberhart was wounded when Petitioner came in and began beating the barber over the head with a hammer. The jury apparently disbelieved Campbell's version of the events as they convicted him of both the murder and armed robbery of Mr. Eberhart, recommending the death sentence for the murder. Nevertheless, one year later the state called Campbell as their key witness in the trial of Petitioner and had him reiterate this same story before Petitioner's jury. (T. 167-170, 188).

Campbell was the only witness who connected the Petitioner with the crimes against Mr. Eberhart. Petitioner, Mary Carruth, Petitioner's mother, brother-in-law, and brother all testified that

Petitioner spent the evening at his mother's home. (T. 381-382, 410, 429, 432, 434). Petitioner and Mary Carruth further testified that they picked Campbell up across the street from the barbershop on their way out of town (T. 410-411) and he told them he had been in a fight with the barber. (T. 352, 422).

The general theory of the state in both cases was apparently that Drake and Campbell probably planned the robbery together. However, the State, headed by the same special prosecutor in each case, made directly contradictory and preclusive representations as to which of the two did the actual killing.

In the Campbell case the prosecutor vehemently represented that Campbell was the "actual slayer" (T. 342-343). A year later in Petitioner's case the State deliberately pursued the opposite presentation of the facts alleging Petitioner to have been the actual slayer. (T. 477-478, App. F).

After the evidence in the case was concluded the trial judge instructed the jury that "murder is the intentional killing of another human being without justification or mitigation. . . " (T. 485). However, the court also instructed the jury that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act." (T. 484) although this presumption may be rebutted.

After six hours of deliberation the jury convicted Petitioner of both the armed robbery and murder of Mr. Eberhart. (T. 500).

During the sentencing phase of the case the prosecutor quoted from and attributed to Justices of the Georgia Supreme Court inflammatory passages from very early Georgia cases. (T. 513-514). These passages are set out in ~~full in Appendix B~~ Section II of Reasons for Granting the Writ, infra. The prosecutor

also made a questionable reference to the execution of Gary Gilmore (T. 514-515) which was objected to by defense counsel as an attempt to inflame the passions of the jury (T. 525-526).

During the charge to the jury during the sentencing phase the court instructed the jury that they could consider the following circumstances in mitigation:

1) "that the murder was committed while the offender was engaged in the commission of another capital felony, to wit, armed robbery." (T. 523)

2) "that defendant committed the offense of murder for himself or another for the purpose of receiving money or any other thing of value", and, (T-523)

3) "that the offense of murder by the defendant was outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim." (T. 524)

The jury subsequently returned a sentence of death and finding that the 1st and 3rd aggravating circumstances were present. (T. 529)

b) How the Federal Questions were Raised Below

The Petitioner appealed his convictions and sentences to the Supreme Court of Georgia specifically raising the issue of improper prosecutorial remarks during argument in the sentencing phase. While noting that reading to the jury from the very passages which the prosecutor recited had already been condemned by that Court in an earlier case the Georgia Supreme Court nevertheless affirmed Petitioner's conviction and sentence, distinguishing Petitioner's case from the earlier one condemning the remarks on the grounds that in Petitioner's case the prosecutor was addressing himself to the Court and not the jury. Drake v. State, 241 Ga. 583 (1978)(App. A, 4-5).

A Petition for Writ of Certiorari was filed by Petitioner's

trial counsel in this court raising the issue of the prosecutor's remark but certiorari was denied.

Subsequently other counsel filed a Petition for Writ of Habeas Corpus on Petitioner's behalf in the Superior Court of Butts County, Georgia, raising each of the issues presented in this Petition for Certiorari along with several other issues.

On December 14, 1980 the Petition for the Habeas Corpus was denied by the Superior Court.

In his order (attached as Appendix B) the Superior Court Judge held that since the issue as to the prosecutors reading of prejudicial excerpts from old Georgia caselaw had already been decided by the Georgia Supreme Court he was bound by the law of the case (B-8).

As to Petitioner's contention that the trial judge's instruction during the guilt phase that "the law presumes that a person intends the natural and probable consequences of his acts . . . " violated due process and Sandstrom v. Montana, 61 L.Ed.2d 39 (1979), because it shifted the burden to the defendant on the element of intent the habeas judge held that in order to be burden-shifting a charge must create a conclusive presumption. Since the trial judge told the jury that the burden could be rebutted the habeas judge ruled that the charge was not burden-shifting. (B-9)

Petitioner's contention that the contradictory presentations of who killed Eberhardt by the state violated rudimentary demands of justice and thus due process was dismissed by the habeas judge in a peculiar way. The judge opined that it was the co-defendant William Campbell whose rights were violated by this tactic but that Petitioner's rights were not violated (B - 10-12).

Finally as to Petitioner's contention that the aggravating circumstances "that the murder was outrageously or wantonly vile, horrible or inhumane" was overbroad and vague so as to allow the imposition of death in an arbitrary fashion. The habeas judge ruled that as the law stands now that contention is without merit. He further opined that since the jury also found the existence of another aggravating circumstances even if the objectionable circumstances were deemed unconstitutional there would be no ground for relief. (B-12).

Petitioner sought review of the Superior Court judges denial of his habeas petition by filing an Application for a Certificate of Probable Cause in the Georgia Supreme Court. This application was denied with two justices dissenting on January 24, 1980. (Order attached hereto as Appendix C) On February 19, 1980 a Motion for Reconsideration of Said Application was also denied with two justices dissenting. (Order attached hereto as Appendix D).

It is from the denial of his Petition for Writ of Habeas Corpus and from the denials of his application for a Certificate of Probable Cause that Petitioner now seeks review in this Court.

REASONS FOR GRANTING THE WRIT

THE PETITION PRESENTS THE FOLLOWING SUBSTANTIAL FEDERAL QUESTIONS WHICH HAVE NOT HERETOFORE BEEN DETERMINED BY THIS COURT AND ARE OF SUCH CONSTITUTIONAL IMPORT THAT THEY SHOULD NOW BE DECIDED:

I. WHERE THE FACTS OF THE CASE WERE SUCH THAT ONLY ONE PERSON COULD HAVE BEEN THE ACTUAL PERPETRATOR OF THE KILLING AND THE SPECIAL PROSECUTOR HAD PREVIOUSLY OBTAINED A DEATH SENTENCE IN THE SEPARATE TRIAL OF THE CO-DEFENDANT BY REPRESENTING TO THE JURY IN THAT CASE THAT IT WAS THE CO-DEFENDANT WHO WAS THE ACTUAL PERPETRATOR OF THE KILLING, WHETHER IT WAS A VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS FOR THE SAME SPECIAL PROSECUTOR TO REPRESENT TO THE JURY AT PETITIONER'S LATER TRIAL THAT IT WAS THE PETITIONER AND NOT THE CO-DEFENDANT WHO WAS THE ACTUAL PERPETRATOR OF THE KILLING FOR THE PURPOSE OF OBTAINING A CONVICTION AND DEATH SENTENCE IN PETITIONER'S CASE AS WELL.

The State indicted both Henry Drake and William Campbell for the murder and robbery of E. C. Eberhart. The two defendants were tried separately with Campbell being tried first.

The State's representation in the Campbell case was that Campbell actually committed the murder and that Drake was an aider and abettor to both the murder and armed robbery. This theory of the facts was made crystal clear to the jury in the special prosecutor's closing argument in Campbell's trial (CT 342-44, See App. G) in which he vehemently represented that Campbell was the "actual slayer" (CT 343). He represented that although Campbell was smaller than Eberhart, "he was drinking, and his adrenalin glands were working, because he was smaller, and that is why he took the knife and stuck it in him and it weakened the old man and they fought" . . . "he is not as big a man as Mr. Eberhart and that is why they had one hellacious struggle." (CT 342).

By urging that Campbell was the actual perpetrator of the gruesome killing, the prosecutor was not only able to convict him,

but was also able to convince the jury that he should be sentenced to death.

When Petitioner Drake was tried a year later, the State decided to utilize the same tactics to get the jury to impose the death sentence on Drake. Having already secured a death penalty conviction on Campbell, the State deliberately pursued the opposite presentation of the facts in Drake, representing that Drake was the actual perpetrator of the crime. To bolster their new version of the truth, the State introduced the testimony of Officer Stone (which Petitioner contended in his habeas corpus Petition to be inadmissible evidence) to the effect that, based on his brief observation, Campbell would not be capable of hard physical labor. In addition, they introduced testimony from Campbell himself that he suffered from emphysema and asthma. (T.234) In closing argument in Drake, the prosecutor utilized these pieces of evidence to forcefully argue that Drake must have committed the murder because Campbell was not physically able to do so. (T 477-78, App. F). By urging that Drake was the actual slayer, the State was able to obtain a conviction and secure the death penalty in his case just as they did in the Campbell case.

Petitioner contends that the actions of the State in pursuing an approach in Drake directly contradictory to their approach in Campbell was a breach of the prosecutorial obligation of good faith which resulted in a denial of Petitioner's due process rights to a fair trial.

It is an unquestioned principle of our system of justice that the State must act with the utmost integrity and good faith in pursuing corrections. Beto v. Stacks, 408 F.2d 313 (5th Cir. 1969). Similarily, it is well recognized that misconduct on the

part of a prosecutor can rise to the level of a constitutional deprivation. Malley v. State of Conn., 414 F. Supp 1115 (D Conn. 1976); Lewis v. Clark, 408 F.2d 1209 (D.C. Cir. 1967). As the court in Lewis, supra., noted prosecutorial misconduct which violates civilized notions of fairness taints the entire criminal process.

The methods utilized by the State in pursuing the convictions and death sentences in the cases of William Campbell and Henry Drake violated basic notions of fairness and justice. No doubt the violent way in which Eberhart was killed (by blows to the head with a claw hammer) had a tremendous impact on the jurors' minds in each case in determining whether to give the death penalty. It is also virtually certain under the evidence that only one of the two defendants, Drake or Campbell, could have done the actual killing even if it were true that they were both involved in the robbery. It, therefore, violates the rudimentary concepts of justice for the State to deliberately seek out two death sentences in the manner that they did when they knew that only one of the defendants actually committed the act which the prosecution deemed deserving of the death penalty.

Furthermore, the representation by the prosecution at Petitioner's trial that Co-Defendant Campbell could not have committed the killing because he was too frail physically was no doubt extremely damaging to Petitioner with respect to whether he had anything at all to do with the crime. Petitioner testified at trial that he was never in the barber shop and had nothing to do with either the robbery or the killing. The representation by the State that Petitioner must have been involved because Campbell was physically unable to have killed the victim was critical to

Petitioner's claim of innocence and unjustly so since the State led the jury to believe something that the State obviously believed to be false, since they took the position in Campbell's case that he was physically capable of having committed the killing all by himself. It cannot be argued that the actions of the State were not deliberate because the same prosecutor was involved in the trial of both cases.

Petitioner urges that in addition to violating general notions of fairness, the conduct of the prosecutor in the Drake case also constituted the more specific misconduct of knowingly using false or perjured testimony. It is a well-established principle that the knowing use by a State prosecutor of perjured testimony ordinarily results in a deprivation of fundamental due process, violating the Fourteenth Amendment and requiring a new trial. Napue v. Illinois, 360 U.S. 264, 269, 271-72 (1959); Giglio v. United States, 405 U.S. 150, 153 (1972); United States v. Anderson, 574 F.2d 1347 (5th Cir. 1978). This rule has also been held applicable where the prosecutor allows the jury to be presented with a materially false impression (see Anderson, supra.) and where the prosecutor allows his witness to give false testimony the accuracy of which he has reason to doubt. Imbler v. Craven, 298 F. Supp 795 (C.D. Cal. 1969). As the prosecutor established on the record (T 188), the testimony of Campbell at Drake's trial was substantially the same as that given in his own trial. Since the jury in Campbell's own trial convicted him, they must have found that his story was largely false. And yet, the prosecutor utilized this false testimony to convict Henry Drake and to sentence him to death. The knowing use of this false testimony violated Petitioner's due process rights.

In sum, whether the conduct of the prosecutor is considered

as the knowing use of perjured testimony or only as a general act of trial strategy, that conduct was violative of constitutional due process standards. As the United States Supreme Court held in Berger v. United States, 295 U.S. 78 (1935), it is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The Court should accept Cert on this issue so that it may more clearly define the basic due process parameters of acceptable trial tactics for the prosecution of criminal cases.

II. WHETHER PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE PROSECUTOR'S USE OF PREJUDICIAL AND INFLAMMATORY ARGUMENT IN THE PRESENCE OF THE JURY UNDER THE GUISE OF THOSE COMMENTS BEING DIRECTED TO THE COURT.

After obtaining Petitioner's conviction by using the Jekyll and Hyde tactics outlined in issue I above the special prosecutor utilized a highly inflammatory and emotional appeal to the passions and prejudices of the jury to obtain the death sentence.

In his argument during the sentencing phase of Petitioner's trial, the prosecutor quoted from and attributed to the Justices of the Georgia Supreme Court the sentiments expressed in the following passage from Eberhart v. State, 47 Ga. 598, 610 (1873):

> We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at least (sic) about to suffer for a crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished, and criminals warned, and the false

> humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society . . . we have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist upon mercy to society.

The prosecuting attorney then went on to quote the Court in Eberhart as saying that:

> a stern, unbending, unflinching administration of the penal laws, without regard to position or sex, that it is the highest mark of civilization, and it is also the surest mode to prevent the commission of offenses.
>
> (T. 513-514, ~~Appendix "B", E 2~~).

In reviewing another death case involving the use in argument of this same passage to determine "whether the sentence was imposed under the influence to passion, prejudice, or any other arbitrary factor", (Ga. Code Ann. §27-2537(C)(1)), the Georgia Supreme Court held that:

> The District Attorney's attribution of these sentiments to a justice of this Court with the object of influencing the jury to impose the death penalty was improper and is disapproved.

Hawes v. State, 240 Ga. 327 at 336 (1977); and see Lamb v. State, 241 Ga. 10, 15 (1978) (also holding such argument improper).

The passions of the jury were further aroused when the

prosecutor similarly read the following inflammatory excerpt from Hawkins v. State, 25 Ga. 207 (1857):

> Human life is sacrificed at this day, throughout the land, with more indifference than that of the life of a dog, especially if it be a good dog. Cain was the first murderer, but who is the last is known only to those who have read the morning papers . . . If this crime goes unpunished, let our skirts, at least, be free from the stain of blood-guiltlessness.

(T. 513, ~~App. E~~ 2)

Petitioner's trial counsel specifically objected to the reference to Gary Gilmore as an attempt to inflame the passions of the Jury. (T. 525-526, ~~App. F~~). No such specific objection was made to the reading of the excerpts from Eberhart and Hawkins, however, under Georgia statutory and case law no objection is required to preserve the issue of an improper charge in a criminal case. (Ga. Code Ann. §70-207; Thomas v. State, 234 Ga. 615 (1975); White v. State, 243 Ga. 250 (1979); Tiller v. State, 224 Ga. 645 (1968).

The use by the prosecuting attorney of the reference to Gary Gilmore, of the passage from Hawkins and of the previously cited passage from Eberhart to unduly influence the jury to give the death penalty violated defendants' due process rights and should have resulted in the setting aside that sentence. This is particularly true in a case such as this where the evidence against the defendant is so threadbare and dubious that it took the jury six hours to reach a verdict, because it

is in this sort of case that it can be said that the reading to the jury from these cases in all likelihood did cause or at least significantly contribute to the sentence of death.

The Georgia Supreme Court did not grant Petitioner relief based on this claim on direct appeal. In Drake v. State, 241 Ga. 583, 587 (1978), the Court said:

> . . . the prosecutor in this case read . . . from . . . Eberhardt (sic) . . . This practice was condemned in Hawes (cit.) when used for the purpose of persuading the jury to impose the death penalty, but as in Campbell v. State, supra, (240 Ga. 352), the prosecutor in this case was addressing not the jury but rather the court. We held in Campbell that the presence of the jury during such arguments did not bring the argument within the scope of Hawes, though it would be preferable if such arguments were conducted outside the jury's presence.

The Court held the improper and highly inflammatory argument by the prosecutor not to be reversible error in Drake because they found that the prosecutor was addressing the Court and not the jury. The danger of such a rule is that it permits prosecutors to bypass constitutional restraints on comments made to improperly influence the jury by simply prefacing those comments with a phrase such as 'may it please the court'! This technique was masterfully employed by the special prosecutor in this case. Apparently the Court made their decision that the prosecutor was addressing the Court based on the fact that he prefaced each

excerpt with the phrase "If your Honor please." A reading of the prosecutor's full argument on the sentencing phase makes clear that he was couching a series of inflammatory and emotional arguments to the jury in language which would convey on paper a sham pretext of addressing the Court. One specific indication of that fact is found on page 511 of the trial transcript ~~(See Appendix A)~~ where the court prefaces the District Attorney's entire argument with the following statement:

> The Court recognizes Mr. Huff now for any remarks he wants to make to the jury. (Emphasis added).

On Habeas review the trial Court had before it on this issue not only the transcript of the prosecutor's sentencing argument, but also a sworn affidavit from Mr. Andrew Hill, Jr. (App. E), Petitioner's trial counsel, stating that the prosecutor was, in fact, physically addressing himself not only to the Court, but also to the jury.

Even if the prosecutor had, in fact and not just in form, been reading to the court the prosecutor's comments would still require a reversal of the death sentence.

Under Ga. Code Ann., Sec. 27-2537, (c)(1), the Supreme Court of Georgia is to consider whether any sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. This procedure is part of that sentencing procedure approved by this Court in the case of Gregg v. Georgia, 428 U.S. 153 (1976) wherein the entire procedure for applying the death penalty in Georgia was approved. The Georgia Supreme Court abdicated its duty under §27-2537 by its opinion and

reasoning affirming petitioner's convictions and sentences and rejecting this enumeration of error.

The procedure approved by this Court in the Gregg case, supra, provides that the Supreme Court of Georgia will act as a guardian of the rights of a defendant by seeing that a sentence of death is not imposed under the influence of any passion, prejudice, or other arbitrary factors. By the Georgia Supreme Court's making such a distinction as addressing one's comments "to the court" and "to the jury", when the jury is present at all times and hears all the comments, the Georgia Supreme Court has abdicated its duty as the guardian of this petitioner's rights, and has in fact deprived this petitioner of his rights to due process of law. With the jury being present in the courtroom throughout this entire argument made "to the court", it was as if this argument was being directly made to the jury. The jury heard every quote read and attributed to a justice of the Georgia Supreme Court; it also heard that "Gary Gilmore, if Your Honor please, will never ever kill anyone else again." There is no way that a jury could impose a death penalty after having heard the excerpts and the reference to Gary Gilmore without having some prejudice against the petitioner or having their passions inflamed against him. It is under the watchful eye of the Georgia Supreme Court that a death penalty is to be imposed, and yet it is by a process and procedure now approved by the Georgia Supreme Court that petitioner contends he was deprived of that degree of fundamental fairness guaranteed by the due process rights clause of the 14th Amendment. This Court should grant Certiorari in order to prevent this deprivation

of constitutional rights by the Georgia Courts under the rule which the Ga. Supreme has created with regard to prejudicial argument made in the presence of the jury but "directed to" the court.

III. WHETHER ONE OF THE STATUTORY "AGGRAVATING CIRCUMSTANCES" UPON WHICH THE JURY RELIED IN DECIDING UPON DEATH IS SO OVERBROAD AND VAGUE THAT PETITIONER'S SENTENCE BASED UPON THIS STATUTORY PROVISION WAS UNCONSTITUTIONAL?

The jury was instructed during the sentencing portion of appellant's trial that they could consider several possible aggravating circumstances in order to justify imposing the death sentence in the case. Among the aggravating circumstances charged was Ga. Code Ann. §27-2534.1(b)(7)--that the offense "was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind or an aggravated battery to the victim". This aggravating circumstance was ultimately relied upon by the jury in recommending the death sentence. (T. p. 529)

On October 9, 1979, this court granted certiorari in the case of Godfrey v. Georgia, 243 Ga. 302 (1979), No. 78-6899, to consider whether or not the above cited aggravating circumstance is overly broad and vague and thus violative of the Eighth and Fourteenth Amendments. It is the appellant's contention that Code Section 27-2534.1(b)(7) provides virtually no guidance whatever to a jury in making their sentencing determination in a death case because any murder could be said to involve torture, depravity of mind, or an aggravated battery to the victim. By its very nature, the offense of murder virtually without exception involves one or more of these three "factors". Thus, under Code Section 27-2534.1(b)(7), every murder could be considered outrageously, or wantonly vile, horrible or inhumane behavior meriting the death sentence. Thus, the aggravating circumstance set out in §27-2534.1(b)(7) is an uncon-

stitutionally overbroad and vague standard which cannot reasonably guide a jury's decision of when to impose the penalty of death for the offense of murder.

In Furman V. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 (1972), the Supreme Court held that the death penalty could not be imposed under a sentencing procedure in which there was a substantial risk that it would be inflicted in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 883 (1976).

In Banks v. State, 237 Ga. 325, 331 (1976), Hill, J. dissenting, it was stated:

> "In my view, the majority . . . has now adopted an open-ended construction of ground 7 and has placed at least that ground of our statute in peril of being held invalid as being vague and overbroad and thus capable of capricious and unconstitutional application.

A statute vague and overbroad invites arbitrary and capricious application and in light of the stringent due process analysis applied in death penalty cases, is clearly unconstitutional. See Green v. Georgia, ____U.S.____, 60 L.Ed.2d 738 (1979), Gardner v. Florida, 430 U.S. 349 (1977).

It is true that in appellant's case the jury also found as an aggravating circumstance that the murder was committed while the offender was engaged in the commission of an additional capital felony, to wit, armed robbery. However, the jury is not required to recommend death where an aggravating circumstance is found. Since it cannot be determined at this point the effect that consideration of the Code Section 27-2534.1(b)(7) charge had on the jury's recommendation of the death sentence, and there is a reasonable chance that the unconstitutional charge affected this

recommendation, the sentence should be reversed.

Appellant urges that this Court accept certiorari on the issue presented here as it did in Godfrey v. Georgia, supra.

THE PETITION ALSO PRESENTS THE FOLLOWING SUBSTANTIAL FEDERAL QUESTION WHICH THE GEORGIA COURTS HAVE DECIDED IN A WAY NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THE SUPREME COURT:

IV. WHETHER IN ORDER FOR A JURY CHARGE TO BE UNCONSTITUTIONALLY BURDEN-SHIFTING UNDER SANDSTROM V. MONTANA, ____U.S.____, 61 L.Ed.2d 39, 99 S.Ct., (1979), THE CHARGE MUST CREATE A CONCLUSIVE PRESUMPTION.

In Petitioner's case, after all of the evidence was heard, the trial court instructed the jury that a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being (T. 485). The court went on to define legal malice as "the intention to unlawfully kill a human being without justification or mitigation . . ." (T. 485). "In other words," the Court stated, "murder is the intentional killing of another human being without justification or mitigation." (T. 485). However, the court also instructed that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act." (T. 484). Petitioner contends that this instruction and the presumption stated within it had the effect of shifting the burden of proof on the question of malice onto the Petitioner so that the State was no longer forced to prove malice beyond a reasonable doubt and that, as a result, Petitioner's due process rights under Art. I, Sec. I, Para. I of the Georgia Constitution, (Ga. Code Ann. §2-101); and the fifth and Fourteenth Amendments to the Federal Constitution were violated.

The instruction on the presumption of intent given by the Court was taken directly from Ga. Code Ann. §26-604 which codifies

this often used phrase. The presumption being founded in the law of the State, the Georgia Court have routinely upheld instructions based on it as not shifting the burden of proof in violation of Ga. Code §26-501, the Georgia Constitution or the Fourteenth Amendment. Hill v. State, 236 Ga. 703, 224 S.E. 2d 907 (1976); Gatlin v. State, 236 Ga. 707, 225 S.E.2d 224 (1976); Kramer v. State, 230 Ga. 855, 199 S.E.2d 805 (1973); Davis v. State, 140 Ga. App. 890, 232 S.E.2d 164 (1977).

On the other hand, both federal and other states courts have held, for a variety of reasons, that the giving of an instruction similar to that challenged by Petitioner is fatal to the validity of a criminal conviction. (See Chappell v. United States, 270 F.2d 274 (9th Cir. 1959); Block v. United States, 221 F.2d 786 (9th Cir. 1955); Berkowitz v. United States, 213 F.2d 408 (5th Cir. 1954); Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953); Mann v. United States, 319 F.2d 404 (5th Cir. 1963) cert. denied, 375 U.S. 986 (1964); State v. Warbritton, 214 Kans. 506, P.2d 1152 (1973); Hall v. State, 272 So. 2d 590, 593 (Ala. Ct. Crim. App. 1973). See also United States v. Wharton, 139 U.S. App. D.C. 293, 433 F.2d 451 (1970).

This court has repeatedly condemned as violative of the Due Process Clause, the practice of shifting the burden of proof to the Defendant in criminal prosecutions by presuming an ingredient of an offense upon proof of other elements of the offense. Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975). Morisette v. United States, 342 U.S. 358 (1952), and Patterson v. New York, 432 U.S. 197 (1977). And finally in the case of Sandstrom v. Montana, ____U.S.____, 61 L.Ed.2d 39, 99 S.Ct. ____

(1979) involving a murder conviction, the Court held that the trial court instruction to the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts" which was almost identical to the charge given in this case violated the Fourteenth Amendment requirement that the State prove every element of a criminal offense beyond a reasonable doubt, and was therefore unconstitutional.

In denying Petitioner a Writ of Habeas Corpus on this issue the trial court held that Sandstrom, supra, only applies where the charge creates a conclusive presumption and that since the court instructed the jury that the presumption could be rebutted (T. 484) the charge was not burden-shifting (see order at R. 9). The Georgia Supreme Court allowed this interpretation of Sanstrom, supra, to stand by refusing to grant a Certificate of Probable Cause).

The trial court clearly misinterpreted the Sandstrom decision for in that case the court noted that the danger of such a charge was that there was a possibility that the jury may have interpreted the instruction in either of two ways:

> First, a reasonable jury could well have interpreted the presumption as "conclusive" that is, not technically as a presumption as all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence -- thus effectively shifting the burden of persuasion on the element of intent.

Sandstrom v. Montana, 61 L.Ed.2d at 46-47. The Court then held that because the jury may have interpreted the challenged presumption as conclusive, like the presumption in Morisette v. United States, supra; and United States v. United States Gypsum,

supra; or as shifting the burden of persuasion, like that in Mullaney v. Wilbur, 421 U.S. 684 (1975) and because either interpretation would have violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt, the instruction was unconstitutional.

Even though the jury in Petitioner's case was instructed that the presumption could be rebutted they could have reasonably interpreted the instruction to direct that they find intent upon proof of Defendant's voluntary acts, unless the Defendant proved the contrary. Such an interpretation would have shifted the burden of proof to Petitioner on the issue of intent.

This court should grant Certiorari on this issue to correct the misapplication of Sandstrom, supra, by the Georgia Courts before it becomes precedent-setting.

CONCLUSION

Based on the foregoing reasons, Petitioner contends that the Georgia Supreme Court erred in refusing to grant his application for Certificate of Probable Cause from the denial of his State Petition for Writ of Habeas Corpus. Therefore, a Writ of Certiorari should issue to review the judgment of the Superior Court of Butts County denying Petitioner habeas corpus relief.

Respectfully submitted,

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APPENDICES

440.370 and the sufficiency of notarized affidavits supporting arrest warrants in pre-conviction extradition cases.

The admission into evidence of the unsworn 1968 Kentucky Parole Board warrant directing that petitioner be returned from Indiana was not error because it also appears as one of the documents accompanying the renewed request for extradition by the Governor of Kentucky referred to above. *Baker v. Smith*, 233 Ga. 644 (1) (212 SE2d 819) (1975).

3. Petitioner argues that the trial judge's statement that he was not going to hold the previous Indiana judgment to be res judicata so far as extradition is concerned constituted an expression of opinion in violation of Code § 81-1104. This case was tried without a jury and Code § 81-1104 is not applicable. See Code Ch. 81-11, "Charge of the Court." See also *Garrick v. Tidwell*, 151 Ga. 294 (6) (106 SE 551) (1920).

Judgment affirmed. All the Justices concur.

SUBMITTED APRIL 11, 1978 — DECIDED JUNE 27, 1978 — REHEARING DENIED JULY 20, 1978.

Habeas corpus; extradition. Coweta Superior Court. Before Judge Knight.

George C. Rosenzweig, for appellant.

Sanders, Mottola, Haugen, Goodson & Odom, Charles Van S. Mottola, C. Bradford Sears, Jr., for appellee.

33463. DRAKE v. THE STATE.
241 Ga. 583 (1978)

HALL, Justice.

Henry Arthur Drake was convicted of the murder and armed robbery of C. E. Eberhart, and sentenced to death for the murder, and to life imprisonment for the armed robbery. This is the direct appeal of these convictions, and the death sentence.

Prior to this trial William Campbell was also convicted of the murder of C. E. Eberhart, and was sentenced to death for the murder, and to life im-

APPENDIX "A"

prisonment for the armed robbery. The convictions and death sentence of Campbell were affirmed in *Campbell v. State*, 240 Ga. 352 (240 SE2d 828) (1977). The evidence in Drake's trial was essentially the same as that in Campbell's trial.

In the instant case Campbell reluctantly testified against Drake. Campbell had lived with Drake and Mary Caruth in Caruth's house after he and Drake were released from prison, where they met. The three drove to Colbert in the late afternoon of the day of the offenses, where Campbell got out in front of the victim's barbershop, and proceeded to get a haircut. According to Campbell's testimony, Drake entered the barbershop wearing a black wig while Campbell was still in the barber's chair. Drake was carrying a claw hammer, and struck the victim with it. Campbell protested, telling Drake not to hit "the old man," at which point Drake struck Campbell with the hammer. Drake continued to struggle with the victim until Eberhart passed out from the blows to his head. The victim was also stabbed.

Eberhart died several months later from the head wounds. Approximately three hundred dollars was stolen.

The state's case rested largely on Campbell's testimony, since there was no other direct evidence, and little circumstantial evidence of Drake's participation in the crime. Campbell's testimony was impeached by proof of prior inconsistent statements and prior felony convictions. The testimony was corroborated in a variety of particulars by Mary Caruth's testimony, Drake's own testimony, and some physical evidence, including a knife found at the scene which matched the description of a knife belonging to Drake.

The victim was over 70 years old, but he was healthy and there was evidence of a tremendous struggle in the barbershop. Campbell was in his sixties, and suffered so severely from asthma and emphysema that he could not exert himself strenously. Drake, on the other hand, was healthy and in his thirties. From this the state argued that Drake must have been the one who actually beat the victim.

Mary Caruth's testimony in general supported

Drake's alibi defense that he was at his mother's house in Colbert at the time of the offense. However, Caruth's testimony was impeached by prior inconsistent statements. Drake and his mother also testified in support of his alibi.

1. The denial of a new trial by the trial court on the grounds that the verdict of the jury was contrary to evidence and the principles of justice and equity, Code § 70-202; and that the verdict was decidedly and strongly against the weight of the evidence, although there may appear to be slight evidence in favor of the verdict, Code § 70-206, is enumerated as error. We do not have the discretion to grant a new trial on these grounds; we can only review the evidence to determine if there is any evidence to support the verdict. *Campbell v. State*, supra.

In determining whether there is any evidence to support the verdict we resolve all conflict in the evidence to favor the verdict. *Eubanks v. State*, 240 Ga. 544, 546 (242 SE2d 41) (1978). The credibility of Campbell's testimony was for the jury to decide. Code § 38-1805. This testimony was ample to support the denial of a new trial. *Campbell v. State*, supra, at 355.

2. Appellant also contends that his conviction rested entirely on circumstantial evidence which did not exclude every other reasonable hypothesis except that of guilt. Code § 38-109. We disagree. Campbell's testimony was direct evidence of Drake's guilt.

3. A third related contention is that there was no corroboration of Campbell's testimony, and since he was an accomplice, appellant's conviction was barred by Code § 38-121. We first note that there is no dispute that Campbell was an accomplice under the state's theory of the case, and that there was evidence to support this position.

Appellant does not argue that there was insufficient general corroboration of Campbell's testimony. Rather, he argues the second test, i.e., whether there was "independent corroborating evidence which tends to connect the *accused* with the crime." *West v. State*, 232 Ga. 861, 865 (209 SE2d 195) (1974); *Birt v. State*, 236 Ga. 815, 825 (225 SE2d 248) (1976). The test is whether the testimony of the accomplice was corroborated by "facts or

circumstances which, in themselves and independently of the testimony of the accomplice, directly connect the defendant with the crime, or lead to the inference that he is guilty, and more than sufficient to merely cast on the defendant a grave suspicion of guilt." *Price v. State*, 208 Ga. 695, 696 (69 SE2d 253) (1952); *Smith v. State*, 238 Ga. 640, 642 (235 SE2d 17) (1977).

The necessary corroboration may consist entirely of circumstantial evidence, and evidence of the defendant's conduct before and after the crime was committed may give rise to an inference that he participated in the crime. *Williams v. State*, 222 Ga. 208, 220 (149 SE2d 449) (1966). Appellant was connected to the crime by the distinctive pocketknife found at the scene which matched the description of appellant's knife. In addition, it was established without dispute that appellant and Mary Caruth drove Campbell to the barbershop, drove him home with them after the robbery, and later drove him to Atlanta so that he could flee the state even though by that time Drake admittedly knew of Campbell's involvement in the crimes. This evidence was sufficient corroboration of Drake's involvement in the crimes. See *Birt v. State*, 236 Ga. at 825.

4. Appellant alleges that he was denied an impartial jury because of the relationship of a juror to the deceased. During the trial a juror learned for the first time (from his wife) that his wife's sister's husband was the victim's great uncle.[1] This information was made known to the court and counsel, but appellant's motion to strike the juror was denied when the juror stated that this relationship would not affect him in any way, and that he remained impartial. There was no evidence of any partiality, thus it was not error to deny the motion. The fact that appellant states he would have used a peremptory strike to remove the juror had the relationship been disclosed during voir dire does not change the fact that he had an impartial jury.

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[1] Appellant does not contend the juror was disqualified under the relevant statutes. See Code §§ 59-716, 59-804 (4).

Death Sentence Review

The remaining enumerations of error are best covered in our review of the death sentence under Code § 27-2537 (c) (2).

5. Appellant complains that the argument of the district attorney in the penalty stage resulted in the imposition of the death penalty under the influence of passion, prejudice, and other arbitrary factors. More specifically, the prosecutor read dicta from cases, including *Eberhardt v. State*, 47 Ga. 598, 609 (1873). This practice was condemned in *Hawes v. State*, 240 Ga. 327, 336 (240 SE2d 833) (1977), when used for the purpose of persuading the jury to impose the death penalty, but as in *Campbell v. State*, supra, the prosecutor in this case was addressing not the jury but rather the court. We held in *Campbell* that the presence of the jury during such arguments did not bring the argument within the scope of *Hawes*, though it would be preferable if such arguments were conducted outside of the jury's presence. See also *Presnell v. State*, 241 Ga. 49, 62 (243 SE2d 496) (1978) (holding that such arguments may be harmless error).

Appellant also complains of a brief reference to Gary Gilmore[2] in the prosecutor's arguments. We agree that the reference was improper, but it too was made to the trial court. Moreover, this reference was not likely to inflame the passions or prejudices of the jury.

6. We find no error in the trial court's charge to the jury relating to the sentencing phase of the trial. The appellant's fourth and sixth enumerations of error are without merit. *Spivey v. State*, 241 Ga. 477 (1978).

7. After reviewing the entire record and transcript and considering the foregoing enumerations, we conclude that the sentence of death imposed on Henry Arthur Drake was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

The jury found the following statutory aggravating circumstances: (1) "The offense of murder was committed while the offender was engaged in the commission of an

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[2] Gilmore was the first person executed in the United States since revised death penalty statutes were enacted.

additional capital felony, to-wit: the armed robbery of C. E. Eberhart." Code Ann. § 27-2534.1 (b) (2). (2) "The offense of murder was outrageously and wantonly vile, horrible, an[d] inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." Code Ann. § 27-2534.1 (b) (7). These statutory aggravating circumstances are supported by the evidence.

8. In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find the similar cases listed in the appendix support affirmance of the death penalty.

Henry Drake's sentence to death for murder is not excessive or disproportionate considering both the crime and the defendant. Code Ann. § 27-2537 (c) (3). The verdict is factually substantiated.

Judgment affirmed.[3] *All the Justices concur, except Hill, J., who also concurs, except that he does not concur in all that is said in Divisions 1 and 6 of the opinion.*

ARGUED MAY 9, 1978 — DECIDED JUNE 27, 1978 — REHEARING DENIED JULY 20, 1978.

Murder, etc. Madison Superior Court. Before Judge Grant.

Andrew J. Hill, Jr., Andrew J. Hill, III, for appellant.

Bryant Huff, District Attorney, Arthur K. Bolton, Attorney General, Daryl A. Robinson, Assistant Attorney General, for appellee.

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[3] Including the cases decided today there have been 74 capital felony cases in which the death penalty was imposed and reviewed by this court pursuant to the Georgia Death Statute. 53 have been affirmed and 21 have been reversed by this court. With respect to race, the cases involved 31 defendants who were white and 43 who were black. Of the 21 cases reversed, 8 were white and 13 were black. 5 of the 53 affirmed cases were reversed by the Supreme Court of the United States.

APPENDIX.

Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974); *Moore v. State*, 233 Ga. 861 (213 SE2d 829) (1975); *Floyd v. State*, 233 Ga. 280 (210 SE2d 810) (1974); *Jarrell v. State*, 234 Ga. 410 (216 SE2d 258) (1975); *Mitchell v. State*, 234 Ga. 160 (214 SE2d 900) (1975); *Berryhill v. State*, 235 Ga. 549 (221 SE2d 185) (1975); *Dobbs v. State*, 236 Ga. 427 (224 SE2d 3) (1976); *Goodwin v. State*, 236 Ga. 339 (223 SE2d 703) (1976); *Pulliam v. State*, 236 Ga. 460 (224 SE2d 8) (1976); *Birt v. State*, 238 Ga. 402 (233 SE2d 362) (1976); *Pryor v. State*, 238 Ga. 698 (234 SE2d 918) (1977); *Young v. State*, 239 Ga. 53 (236 SE2d 1) (1977); *Corn v. State*, 240 Ga. 130 (240 SE2d 694) (1977); *Campbell v. State*, 240 Ga. 352 (240 SE2d 828) (1977).

33472. MELTON v. PACIFIC SOUTHERN MORTGAGE TRUST et al.

HILL, Justice.

In 1973, plaintiff Melton contracted with National Community Builders, Inc. (NCB), a California construction and land development corporation, to furnish labor and materials to NCB to improve certain property in Fulton County owned and being improved by NCB. When NCB ceased work on its property, Melton placed a materialman's lien on it in February of 1974, in the amount of $32,407.61. Unbeknownst to Melton, on March 1, 1974, NCB transferred the property to another California corporation, U. S. Guaranty Capitol Corporation. U. S. Guaranty and NCB then each filed Chapter XI bankruptcy proceedings in the U. S. District Court for the Southern District of California, on August 2, 1974, and September 24, 1974, respectively.

Melton filed a claim in the NCB bankruptcy in December, 1974; because he was not notified that this claim had been received, he filed a duplicate claim in January, 1975. The first claim was disallowed as duplicative; the second was allowed as an unsecured claim, the property subject to the lien having been

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

HENRY ARTHUR DRAKE,	:	
	:	
PETITIONER	:	
	:	
VS.	:	CIVIL ACTION NO. 4246
	:	
WALTER ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	HABEAS CORPUS
	:	
	:	
RESPONDENT	:	

O R D E R

Petitioner was convicted of Murder and Armed Robbery in the Superior Court of Madison County. He was sentenced to death for the murder, and his conviction and the imposition of the death penalty were affirmed by the Supreme Court of Georgia. Drake v. State, 241 Ga. 583 (1978). This Petition for Habeas Corpus attacks the legality of Petitioner's conviction and the imposition of the death penalty on twenty-six grounds. Although hearing was held on the Habeas Petition, the only evidence presented de hors the record and transcript of the trial is an affidavit by Petitioner's trial counsel. The Court will address the allegations of the Petition in paragraphs which correspond to the numbered paragraphs in the Petition.

I. (COUNT ONE)

Counts One and Twenty of the Petition, as amended, allege that Petitioner was denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel. Count Twenty enumerates nine different instances in which

Petitioner claims that his trial counsel committed acts or omissions amounting to a deprivation of his Sixth Amendment right to the effective assistance of counsel.

(a)

Petitioner alleges that trial counsel was ineffective for failing to introduce evidence on Petitioner's Motion for Change of Venue. A Motion for Change of Venue and the issue of whether a fair and impartial jury can be obtained are, in reality, the same issue. In this case, the trial court reserved ruling on the Motion for Change of Venue until the voir dire had been concluded. Petitioner's trial counsel asked extensive questions of prospective jurors on voir dire and the responses given indicate that it was possible to obtain a jury without preconceived notions about the case. Petitioner does not specify what evidence his trial counsel should have or could have introduced in support of the Motion for Change of Venue. Accordingly, Petitioner has shown nothing to support his allegation that trial counsel was ineffective in this regard.

(b) (c)

Petitioner alleges that his trial counsel was ineffective for failing to object to certain testimony which Petitioner claims was inadmissible and harmful to his case. First, there was testimony that some beer bottles were found at the cemetery and two were admitted into the evidence. Petitioner says that his trial counsel was ineffective for failing to object to the admission of these beer bottles because they tended to corroborate

the testimony of William Campbell, the main witness against Petitioner. Petitioner says that, if proper objection had been made, the Court would have excluded the beer bottles because there were many other beer bottles around the cemetery and these two beer bottles could not possibly be identified as the ones left there as Campbell testified. The Court does not agree with Petitioner that this evidence would necessarily have been excluded had Petitioner's trial counsel objected to it. While of questionable probative value, the trial court in all likelihood would have admitted the evidence for whatever weight the jury wanted to give it. Further, Petitioner's trial counsel might well have concluded that an objection to this weak evidence would do more harm to the mind of the jury than to let it be admitted without protest. This is a matter of strategy, and trial counsel cannot be said now to be ineffective because another lawyer might have handled the matter in a different way. Next, Petitioner alleges that trial counsel was ineffective for failing to object to the following testimony of Agent Stone: "...he wouldn't be capable of any hard physical labor. " (T. 362). Petitioner says that this statement amounted to an inadmissible opinion and that it was extremely prejudicial to defendant because the state's strategy was that William Campbell, who was convicted and sentenced to death prior to Petitioner's trial, was too weak to have committed the murder himself. Petitioner's ground is not good for the reason that an objection to this statement would almost certainly have been overruled. An opinion of a lay witness is admissible if a proper foundation is laid for it, and that was done in this situation. Ga. Code §38-1708.

(d) (e) (f) (g) (h) (i)

Petitioner has presented nothing in support of these alleged instances of ineffective assistance.

The standard used by the Supreme Court of Georgia for an alleged Sixth Amendment violation is whether defense counsel is capable of and did in fact render reasonably effective assistance of counsel. Trial counsel in this case did render reasonably effective assistance of counsel, and that aspect of the habeas petition alleging a deprivation of Sixth Amendment rights is without merit.

TWO, THREE, FOUR AND FIVE

Petitioner presented no evidence and no argument in support of these counts in the Petition. Accordingly, they are considered to have been abandoned and to be without merit.

SIX

In Count Six of the Petition, it is alleged that Petitioner was denied due process of law in that he was convicted on evidence which was so insufficient as to violate due process of law. The Supreme Court of Georgia found that the evidence in Petitioner's case did support the verdict. Drake v. State, supra, at p. 585. But Petitioner argues that the Supreme Court used the "any evidence" test and that the law now requires that the review be based on the standard of whether a rational trier of fact could have found the Petitioner guilty beyond a reasonable doubt. Jackson v. Virginia, ___U.S.___,99 S.Ct.___,

61 L.Ed.2d 560 (197). It has long been the rule that sufficiency of the evidence is not an issue in a State habeas corpus proceeding. Fryer v. Stynchcombe, 228 Ga. 576 (1972). While it could be, as Petitioner asserts, that Jackson v. Virginia now requires a different standard, it is inconceivable that the Supreme Court of the United States would require the appellate courts of every state to relitigate the issue of sufficiency of the evidence in every conviction in which a prisoner is still under restraint. But regardless of this practical problem which would be involved in applying such a new standard to Petitioner's case, it is the view of this Court that there was evidence from which a rational trier of fact could have found Petitioner guilty beyond a reasonable doubt. The State had an eye witness who testified that Petitioner beat the victim to death with a claw hammer. The fact that Petitioner now does not consider that witness (William Campbell) credible is irrelevant to the inquiry made by a habeas court. The jury apparently believed Mr. Campbell's testimony, and Jackson v. Virginia, supra, has nothing to do with the traditional notion that credibility of witnesses is for the jury to determine. The allegations of Count Six are without merit.

SEVEN

In Count Seven, Petitioner alleges that the trial court instructions to the jury failed to provide the jury with guidelines as to how to apply and weigh aggravating and mitigating circumstances; that the trial court's instructions were misleading and left the jury with the

impression that the trial court had already found aggravating circumstances to exist. The Supreme Court has already reviewed the Court's charge in this regard and found it to meet the test laid down in Spivey v. State, 241 Ga. 477 (1978); see Drake v. State, supra, at p. 587.

EIGHT, NINE, TEN AND ELEVEN

These counts were not mentioned by Petitioner at the hearing or in his brief, and they are deemed to be abandoned.

TWELVE

The Supreme Court ruled in Drake v. State, supra, at p. 587, that the death sentence in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Accordingly, the allegations of count twelve have already been decided adversely to Petitioner.

THIRTEEN

In count thirteen, Petitioner alleges that the Supreme Court of Georgia did not properly review the death sentence and did not follow the mandate of the statute in this regard. The report of Petitioner's case indicates that the Supreme Court, in division eight of its opinion, did fulfill the duty of comparing Petitioner's case with other, similar cases and listed them in an appendix. Accordingly, count thirteen is without merit.

FOURTEEN

In count fourteen, Petitioner alleges that he has been denied various Constitutional rights by the failure of the State to pay the costs incident to pursuing this habeas petition. The law does not require that such expenses be paid by the State, Ross v. Hopper, 240 Ga. 369 (1977). And Petitioner has pointed out nothing that would

indicate that he was denied any expense money for any particular purpose. This claim is without merit.

FIFTEEN

In count fifteen, Petitioner claims that he was sentenced to die by a jury that did not believe that he would in fact be executed and that his Constitutional rights were violated thereby. This allegation is unsupported by fact and has been specifically rejected as a matter of law. House v. Stynchcombe, 239 Ga. 222, 226 (1977). It seems to the Court that this argument misses the mark. Most juries may well have the idea that one sentenced to death may never actually have that fate visited upon him, but this feeling would result from the inability of our judicial system to finalize such sentences so that they may be carried out. This Court knows of no credible evidence that juries cavalierly pass down death sentences merely because they do not really believe the sentence will be carried out. Certainly, Petitioner in this proceeding has produced no evidence of any such feeling among those who sat on his jury.

SIXTEEN

Petitioner has presented no evidence or argument in support of count sixteen, and it is found to be without merit.

SEVENTEEN - NINETEEN

Counts seventeen and nineteen both allege that Petitioner was denied due process of law because of the prosecutor's closing argument during the penalty phase of the trial in which he quoted from Eberhart v. State, 47 Ga. 598 (1873) and Hawkins v. State, 25 Ga. 207 (1858). In support of this ground, Petitioner produced an affidavit

of his trial counsel indicating that, when this argument was made, the prosecutor was facing the jury, and not the Court. The purpose of this affidavit was to combat the presumption of fact indulged in by the Supreme Court in reviewing Petitioner's case that the prosecutor was addressing not the jury but the Court when he quoted from these old cases. See Drake v. State, 241 Ga. 583, 587 (1978). On direct appeal, the Supreme Court held that this argument did not violate Petitioner's right to due process because the prosecutor was addressing the Court, and not the jury. The Court said that it would be preferable if such arguments were conducted outside the jury's presence but that there was no prejudice to the defendant if the prosecutor was addressing the Court with the jury present. The Supreme Court knows that the prosecutor was making those remarks for the benefit of the jury and not the judge. Accordingly, the affidavit of Petitioner's trial counsel does not make any difference because the Supreme Court has already decided that no due process rights were violated by allowing this argument to be made in the presence of the jury. While this Court does not agree with the ruling of the Supreme Court on this issue, it has already been decided adversely to Petitioner by the highest Court in this State and until and unless changed by that Court, it will remain the law of this case.

EIGHTEEN

In count eighteen, Petitioner claims that the trial court committed error in instructing the jury that "...the law presumes that a person intends the natural and probable consequences of his acts..." (T. 484). This is a result of the Sandstrom v. Montana, _____ U.S.____, 61 L.Ed 2d 39, 99 S. Ct. ____ (1979) case where a Montana conviction was reversed because the trial court had given a charge that the Supreme Court felt shifted the burden of proof to the defendant. In this case, the Court charged that this presumption could be rebutted and that a person will not be presumed to act with criminal intention. (T.484) .This clearly distinguishes the charge in this case from the one in Sandstrom, and it does not appear that a reasonable juror could have interpreted the charge in this case as meaning that there was a conclusive presumption so as to shift the burden of persuasion to the Petitioner. It was the conclusiveness of the presumption in Sandstrom that offended the Constitution. That is not present in the charge in this case, and the claim by Petitioner that his Constitutional rights were violated thereby is without merit.

TWENTY

See paragraph one.

TWENTY-ONE, TWENTY-TWO, TWENTY-THREE

These counts were abandoned by Petitioner, but they have been examined by the Court and found to be without merit.

In trying Petitioner's case, the Court followed the Ga. statute providing for the imposition of the death penalty, and this statute has been declared constitutional. Gregg v. Georgia, 428 U.S. 153 (1976).

TWENTY-FOUR

Petitioner presented no evidence in support of count twenty-four where he claims that his constitutional rights were violated by the exclusion from the jury of those having conscientious scruples against the death penalty. It has been held that this claim is without merit. Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978).

TWENTY-FIVE

In count twenty-five, Petitioner makes an interesting claim that the "rudimentary demands of justice" were violated by the State pursuing inconsistent theories in prosecuting him and the alleged coperpetrator of the crime. William Campbell was tried for the same murder approximately one year before Petitioner was convicted and given a death sentence. Campbell's case was affirmed by the Supreme Court. Campbell v. State, 240 Ga. 352 (1977). Petitioner points out that, in Campbell's case, the prosecution claimed that Campbell had committed the murder. Then in Petitioner's trial, the State argued that Petitioner must have been the one who actually beat the victim to death because Campbell was too old and weak and sick to have done it. See Drake v. State, 241 Ga. 583, 584 (1978).

The State did exactly what Petitioner says. The only issue is whether the pursuance by the State of inconsistent approaches in cases of this kind

violates the constitutional rights of either or both of the defendants. In support of this argument, Petitioner cites cases holding that there is a prosecutorial obligation to act in good faith and that prosecutorial misconduct can amount to a constitutional deprivation. In response, the Respondent asserts that the prosecution of the two cases was not inconsistent but conveniently moves on quickly to another subject without saying why.

The fact is that the prosecutions were inconsistent. The issue is whether the constitution requires that the State employ basic honesty in prosecuting those accused of crime or whether it can join in the game of seeking a result without much regard for the tactics. The Court does not make this observation lightly and recognizes that the horrible murder of the victim in these cases would likely have moved any community and any prosecutor to do whatever was necessary to bring the responsible parties to justice. The Court seriously doubts, however, that the Constitution can stand many cases where the expedient of exacting justice overpowers completely all sense of fairplay. In this situation, it is actually Mr. Campbell (see Campbell v. State, supra) and not Petitioner who has the superior right to complain about the tactics of the State because Mr. Campbell was convicted and sentenced to death by a prosecution that contended on another day that he was too old and sick and weak to commit the crime.

In Petitioner's case, no real prejudice resulted from the earlier inconsistent approach taken in the Campbell case. One wonders why Mr. Campbell was tried first with nothing but circumstantial evidence and then,

while under a death sentence, called to testify and provide the only direct evidence to convict the Petitioner in this case. But given the reports of the two cases (and this Court has previously heard the habeas corpus petition of Mr. Campbell), the Court has concluded that the argument made by Petitioner in this case that his constitutional rights were violated by this duplicitious prosecution is without merit because it was Campbell, and not Petitioner, whose rights were probably violated by the approach taken by the State.

TWENTY-SIX

In Count Twenty-Six, Petitioner alleges that subsection (7) of Ga. Code Ann. §27-2534.1(b) is unconstitutionally overbroad and vague and thereby violative of the Eighth and Fourteenth Amendments. He says that the Court charged and the jury found that this aggravating circumstance could be used to support a death penalty in his case. He says that the Supreme Court of the United States has granted certiorari in a case (Godfrey v. Georgia, 243 Ga. 302 (1979)) to consider whether this aggravating circumstance is unconstitutionally broad.

Petitioner concedes that the present state of the law is such that this contention is without merit. But even should the Supreme Court decide in the Godfrey case that this aggravating circumstance is unconstitutional, this would not provide grounds for any relief to Petitioner because the jury in his case also found that he committed the offense of murder while engaged in the commission of an additional capital felony, to-wit, the armed robbery of C. E. Eberhart (T. 529). Accordingly,

Count Twenty-Six of the amended petition is without merit.

THEREFORE, having all of the counts and allegations of the Petition for Habeas Corpus, as amended, having been found to be without merit, the Petition, as amended, is denied.

This 14th day of December, 1979.

R. ALEX CRUMBLEY, JUDGE SUPERIOR COURTS, FLINT JUDICIAL CIRCUIT

Application No. 1129

SUPREME COURT OF GEORGIA

ATLANTA, January 25, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

HENRY ARTHUR DRAKE V. WALTER ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill and Bowles, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

APPENDIX "C"
C-1

Joline B. Williams Clerk

SUPREME COURT OF GEORGIA

ATLANTA, February 19, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

HENRY ARTHUR DRAKE V. WALTER ZANT, WARDEN

Upon consideration of the Motion for Reconsideration filed in this application, it is ordered that it be hereby denied. All the Justices concur, except Jordan and Hill, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

STATE OF GEORGIA)
COUNTY OF FRANKLIN)

A F F I D A V I T

Personally appeared before the undersigned attesting officer, ANDREW J. HILL, III, who after being duly sworn, deposes and states on oath as follows:

1.

Deponent is Andrew J. Hill, III, who is an attorney at law, practicing at 144 Vickery Street, Lavonia, Georgia 30553.

2.

Deponent understands that this Affidavit will be used in the habeas corpus hearing of Henry Arthur Drake; said hearing being held following the said Henry Arthur Drake's conviction for the offenses of murder and armed robbery.

3.

Deponent states that he was one of the attorneys representing Henry Arthur Drake at his trial for the offenses of murder and armed robbery in the Superior Court of Madison County, Georgia, wherein the said Henry Arthur Drake was found guilty of both offenses; said conviction being appealed to the Georgia Supreme Court which affirmed his conviction and sentence of life for armed robbery and death for murder on June 27, 1978.

4.

The purpose of this Affidavit is to relate facts known by the Deponent insofar as facts pertain to the trial court's allowance and the District Attorney's reading of certain case law and also certain remarks made by the District Attorney during the sentencing phase of Henry Arthur Drake's trial in the Superior Court of Madison County, Georgia.

5.

Deponent states that during the sentencing phase of Henry Arthur Drake's trial the District Attorney, in the presence of the jury and within their hearing, read excerpts

from two prior Georgia Supreme Court decisions, said cases being Hawkins v. State, 225 Ga. 207, 211 (1858) and Eberhart v. State, 47 Ga. 598, 609 (1873).

Said case law was read by the District Attorney from the speaker's podium, which was situated approximately two to three feet from the jury box, said podium being positioned between the jury box and the trial judge on the bench. That said law was read by the District Attorney with such emphasis and so emphatically, that his only purpose in doing so could have been to influence the passions and prejudices of the jurors that were sitting on said case.

The District Attorney also speaking to the court but in the presence of the jury and from the podium during the sentencing phase of Henry Arthur Drake's trial, made a reference to Gary Gilmore, the first person executed in the United States since the death penalty statutes of various states had been revised.

6.

Deponent further states that from his recollection of the proceedings of the trial in Madison County, Georgia, when the District Attorney was reading the case law to the court in the presence of the jury and also making the statement as to Gary Gilmore, that he would from time to time glance at the jury during this presentation.

This 24th day of July, 1979.

Andrew J. Hill, III

Sworn to and subscribed
before me, this 24th day
of July, 1979.

Harriet W. Jeanneret
Notary Public

Notary Public, Georgia, State at Large
My Commission Expires July 27, 1982

District Attorney's Closing Argument - Drake

show you some of these pictures. This, of course, is the barber shop. This is another view or shot of it from another view, what it looked like from the road. There's the old dump truck; there was testimony about the hammer being recovered from it. That's the door or the entranceway into it--along the frame where the blood was recovered. Look at the wall, just on the inside. See how it had been smeared? A scuffle had taken place. If you would please, just pass those around. Look at the blood on that lavatory. Look at the blood all around that barber's chair. Look at that picture.

Now ladies and gentlemen, I want to talk to you about one other factor. We saw Campbell; you saw him testify, and he talks like this (Mr. Huff is whispering); and the reason he talks like this is a combination of three factors. It's true he lost his false teeth and I think that probably would have helped some. The other is his extreme emphysema that he has. According to officers, that he can't walk even a distance that he doesn't tire and have to sit down and bend over and heave, because when he exerts himself to the least amount, he is exhausted. And of course, the other reason that he is so used to talking low, it's true, he has spent so many years in prison and that's the way they talk. They don't talk out loud in the prison system. They whisper. He doesn't hardly know how to talk loud, only in a whisper.

And I submit to you that Mr. Eberhart, even though he was seventy something years old, that he was a big man, close to 200 pounds, in good health, vigorous, and the testimony was that he led a very active life. And you look at those pictures, and you look what a terrific scuffle took place, and I say to you that under this evidence, William Bill Campbell could not have done all that was done that night. Just that high. Just that high. And I suggest to you, under all that physical evidence, that it took more than little Campbell to have done old Mr. Eberhart in; because we can tell that the old man fought, and he fought, and he fought for his life. And Campbell would have fallen out from sheer exhaustion and emphysema long before those mortal blows would have been done.

Now ladies and gentlemen, this case rests in your hands, the case of the State of Georgia versus Henry Drake--not Bryant Huff, not the family of C. E. Eberhart. Whatever decision you have in this case will meet with my approval. I suggest to you that under the evidence in this case, the State has met its burden of proving beyond a reasonable doubt--not every doubt, not all doubt, because that's not the requirements of the law; only beyond a reasonable doubt. Only moral and certainty reasonableness can ever be expected and we suggest to you under the evidence that the State has met that burden and we ask you to return a verdict of guilty on both

Now, Henry Drake, Mary Carruth and Bill Campbell all living together, none of them working, doing nothing, and that is not what I say, that is what he said, these three people doing nothi Who went in there and killed Mr. Eberhart? Did both of them do it, or did Campbell do it alone, or did Drake do it alone? Well, you see crimes like this are seldom ever committed in the presence of witnesses. I think that you know the people in your community and I think that the evidence shows this, that Drake's mother lives over here and over here is the Barber Shop and Campbell came and lived with Drake and Mary and they weren't making anything, not working and they knew that Mr. Eberhart had some money on him. I have never been in a Barber shop in my life that the barber didn't have some money. You have been, lots of you, and you know they always have change. I think this evidence reflects and you can so find that Drake was pretty well known around Colbert and Campbell was to be the man to case the joint. I have no doubt in my mind that he probably helped Mr. Eberhart sweep the floor and he probably left and waited around and came back, probably real close, where he waited around there and then came back and Mr. Eberhart was fixing to close and Mr. Eberhart opened that door back up and letting them in. I thihk that right there is probably when he stuck that knife in him and that is when the struggle began. Yes, he is not as big a man as Mr. Eberhart and that is why they had one hellacious struggle. He was drinking, and his adrenalin glands were working, because he was smaller, and that is why he took the knife and stuck it in him and it weakened the old man and they fought, and I am sure that Mr. Eberhart knew that the hammer was back there with some more tools and he got the hammer and hit Mr. Campbell over the head with this hammer and

that is why that Type A blood was right there on that hammer and found other places there, because that is the type blood Campbell has got. You may say, Why, Mr. Huff, didn't he take it and hit him like that, but you have to remember that he had this knife in him and they had stuck him and that is probably he was just swinging any way that he could and this hammer is sort of loose on there and he did not get to good a hit on him, but that is why that blood is on the outside of that door, was after it was all over and he was given out and he was tired and he was out there and I am sure he was stooping over and that is when that lady came by and saw the man sitting there and I guarantee you that that is when his head bumped on the side, outside of that door. I don't think it takes anybody with super intelligence to see and understand that. Now, who did it, Campbell, Drake, and you know what I say on this evidence, does it really matter which one, or the two, or if they were in it together. It is my thoughts on this evidence that this is the actual slayer, Mr. Campbell is, of Mr. Eberhart, because you see that no one knew who Campbell was, except some of the Deputy Sheriffs and very few people. You see Campbell told the GBI Agent, "Yeah, I threw the hammer". Now, why would he tell this, because he knew that he had handled that hammer and he felt like that there might be a fingerprint on it, and that was the way he was covering his tracks, to say that, Yes, I handled the hammer. The Barber Tools, he also stated that he handled those also, and he was covering his tracks again. Would you look at those poor little old barber tools. Who on earth would kill a man for a few little old barber tools. Look at that. Here they are, didn't have anything, didn't work for anything. He is the guy that would do a thing like this, to pick up those tools and carry them out of there with him, this garbage and I submit in

a case of this nature that that is all that is, is garbage, t any man that would carry those little clippers out of there. Anyone that had gone through all of this and kill somebody an had to wash up and all, who after getting the money would tak the time to stop to steal a few little old barber tools, exce someone like William (Bill) Campbell that you have ever seen, nobody, nobody. You know the first thing we have to do is th we have to get the defendant present and put a motive in there and then we put him running. Campbell admits the entire case against him except that he didn't do it, that Drake did it. I don't believe that you ladies and gentlemen are going to buy that kind of story and say that, "You are right", and set him free. What would he say on Drake's trial? Well, he would be free. They are both a part of this crime of robbery and murde and there is no mistake about it, under the evidence. You kno it even got down to where even Campbell admits that that watch came into the household that Friday night, no doubt about it, and right over there in Madison, Georgia where they moved to. There is evidence in this case, that they took him to Atlanta and told him to clear out and he went on to Norton, Virginia. My daddy ran a grocery store over there in Lawrenceville all o his life and I can remember the old ice box where we kept the ice and things in and that was my favorite sitting place. I was a small boy and didn't go about much until I got out of highschool and I can remember sitting on that old ice box there in the store and I heard my daddy say one time, and that has been almost thirty seven years ago, and he said, "You know the Bible says, 'The guilty fleeth when no one foreseeth'. Alright flight is evidence of guilt and a fact that you may consider in the trial of this case. You see, you have got motive, you have opportunity; you have got presence; you have got flight and you

it for Drake to drive through and let him out to get Mr. Eberhart's money and then he would pick him back up and one is just as guilty as the other. You might say, "Why did they kill him in the first place", and as Mr. Huff said to you we have got rules that we have to go by in presenting the evidence. A man has the right to get on the stand and take the fifth amendment and refuse to answer that question on the grounds that it would tend to incriminate him, and you can't make him answer, and I don't know whether Drake would have done this or not, but I do know this that under the rules of law, that when you put a witness on the stand, that you are bound by what he says, and if we had put Drake on the stand then we would be bound by what he said when we went to try him. Now, Ladies and Gentlemen, don't let Mr. Campbell hoodwink you by saying that he had nothing to do with it and that Drake did it and don't go out there and say that he is not guilty because you believe what Campbell said. When Drake gets up here before another jury and states that Campbell did it then that jury could say that Drake said that Campbell did it so it must be so and just turn him loose. Ladies and Gentlemen , this is your County and it is a good County and I have always found that Madison County juries will do the right thing and I know that you don't want these people coming in here and killing and robbing your good citizens and get away with it. As Mr. Huff has said, the object of all legal investigations is the discovery of the truth and the truth has come out here on this trial. The only thing that we are interested in in trying to prosecute for the people in these criminal cases is for you to do justice. I say that the truth has come out that this man is guilty as charged and now let's

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6615

ORIGINAL COPY

HENRY ARTHUR DRAKE,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR K. BOLTON
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO.

HENRY ARTHUR DRAKE,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1.

Whether Petitioner's rights were violated by the prosecutor's use of allegedly inconsistent theories in the trials of Petitioner and his co-perpetrator?

2.

Whether the prosecutor's closing argument during the penalty phase of the trial resulted in the imposition of the death penalty under the influence of passion, prejudice or other aribtrary factors?

3.

Whether Ga. Code Ann. § 27-2534.1(b)(7) is overly broad and vague as applied to this case and in accordance with the principles set out by this Court in Godfrey v. Georgia, 27 Cr. L. 3115, decided May 19, 1980?

4.

Whether the state habeas corpus court properly applied this Court's decision in Sandstrom v. Montana, ___U.S.___, 61 L.Ed.2d 39 (1979)?

PART ONE

STATEMENT OF THE CASE

Petitioner, Henry Arthur Drake, was tried in the Superior Court of Madison County for the offenses of murder and armed robbery. Following a jury trial, he was sentenced to life imprisonment for the armed robbery conviction and received the death sentence for murder. On direct appeal to the Supreme Court of Georgia in its mandatory review of the death penalty, Petitioner's convictions and sentences were affirmed. Drake v. State, 241 Ga. 583 (1978). A petition for writ of certiorari from the judgment of the Supreme Court of Georgia was denied by this Court on February 20, 1979.

The Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia and a hearing was held in connection with the allegations raised by means of this petition in the Superior Court of Butts County, Georgia on July 26, 1979. The state habeas corpus court denied Petitioner the relief sought by its order of December 14, 1979.

For purposes of this petition, the evidence produced at Petitioner's trial in the Superior Court of Madison County should be examined. The evidence produced at trial showed the following:

Mr. C. E. Eberhart resided in Culbert, Georgia and ran a barber shop in that community. (T. 284). Mr. Eberhart resided with his invalid wife a short distance from his barber shop. (T. 276). Mr. Eberhart was 74 years old and he and his wife drew social security. Mr. Eberhart cashed his social security checks on December 4, 1975 for "something over $300.00." (T. 279-280), and at noon on December 5, 1975, carried in his billfold two or three hundred dollars in cash. (T. 273-277).

On December 5, 1975, darkness began to set in around 6:00 p.m. (T. 284). Just as it was "getting close to dark" a neighborhood boy walked by Mr. Eberhart's barber shop. He was alone, seated in his barber chair. He and the boy exchanged waves of their hands. (T. 287-288). Shortly thereafter, Mr. Eberhart began to sweep up the hair on the floor of his barber shop, in preparation for closing the shop. A short, diminutive, crew-cut stranger came into the shop for a haircut. (T. 168). This stranger to the community was William (Bill) Campbell. Mr. Campbell's companion, the Petitioner, Henry Arthur Drake, was a life-long resident of Culbert, Georgia, who knew both Mr. Eberhart and his shop. (T. 425). Mr. Drake came in the barber shop in disguise, wearing a black wig. (T. 168). He demanded the victim's money and told the victim he "was gonna rob him and take his money." (T. 169). Armed with a hammer, the Petitioner then beat the victim repeatedly. (T. 170-171). Only after a tremendous struggle had taken place involving both Mr. Drake, Mr. Campbell and Mr. Eberhart, did the Petitioner succeed in subduing Mr. Eberhart.

At 9:00 p.m. that evening, Mr. Eberhart had not returned home so his worried wife summoned a neighbor to go and check on him. The neighbor found Mr. Eberhart lying in the floor of the shop, with blood all over him. The door to the shop was open and the lights were on. No one else was there when the neighbor arrived. The neighbor notified Sheriff Jack Fortson who immediately rushed to the scene. (T. 290-293).

The barber shop reflected the tremendous struggle that had taken place there. (T. 353). There was a large quantity of blood all over the area. The area was described as having a "considerable amount of blood all over the floors, walls, barber chair, cabinets, sink and both doors, with a large pool of blood in the bathroom." Shoe marks, heel marks and wipings, evidenced

the struggle. (T. 353). At Petitioner's trial, photographs were introduced into evidence which depicted the crime scene. (State's Exhibits 15 through 33).

The injuries sustained by Mr. Eberhart were described by various witnesses as follows: "He was down on his knees and sounded like he was trying to talk. He was incoherent and covered with blood. He was hardly recognizable with his head and eyes swollen, and his glasses knocked off." (T. 296). Sheriff Fortson testified that there was one spot in the front of his head that you could "lay a fist in." (T. 308-309). Mr. Eberhart's daughter saw her father on the night he was injured and stated that his head was swollen five times the normal size and his eyes were closed against his eyelids. (T. 400). One of Mr. Eberhart's attending physicians testified that Mr. Eberhart had a stab wound in the chest, multiple lacerations to his scalp, a very swollen head and was in a comotose state. The physician testified that Mr. Eberhart had been beaten by some blunt type instrument and that the injuries were consistent with those that are made by a claw hammer. (T. 150-152). Mr. Eberhart remained unconscious for a long period of time and finally died as a result of these injuries on March 21, 1976. T. 153-155, State's Exhibit No. 1).

Sheriff Fortson had examined Mr. Eberhart as he lay in the barber shop. Mr. Eberhart's pants pockets were pulled inside out and emptied. The sheriff searched but could not find any money or a wallet on Mr. Eberhart or in the barber shop. (T. 314-315). A search of the premises outside the barber shop on the night of the crimes revealed that some barber tools were found wrapped up in a barber's cloth on the side of the barber shop. Also found by investigating officers was a claw hammer in the back metal bed of a dump truck (State's Exhibit No. 11), located ten to fifteen feet from the barber

shop building. (State's Exhibit No. 5) (T. 296). The barber shop was examined by a person from the State Crime Laboratory and only three legible fingerprints were lifted from the shop.

Blood samples were also taken from various places in the barber shop. (State's Exhibit No. 4). These samples were examined along with a sample of the blood of the victim, by the State Crime Laboratory. Both samples were type "O". (T. 266). Mr. Campbell's blood sample was examined and found to be type "A". One particular sample of blood obtained from outside the from door (State's Exhibit No. 3), was examined and found to be type "A". An examination of the claw hammer (State's Exhibit No. 5), was also found to have type "A" blood on the handle. (T. 263-266). Henry Drake's blood was determined to be type "O". (T. 271).

Sheriff Jack Fortson and Charles Stone of the Georgia Bureau of Investigation investigated the robbery and murder of Mr. Eberhart. (T. 306, 325). Their investigation revealed the following evidence and produced the testimony of the following witnesses:

Curtis James ran a dry cleaning establishment across the street from the victim's barber shop. (T. 282). On December 5, 1975, at about 5:00 p.m., he saw Mr. Campbell around his car, which was then parked on the street between his business and the victim's barber shop. He closed his dry cleaning establishment at about 6:00 p.m. and as he departed he saw lights on in the victim's barber shop. He testified that Mr. Eberhart weighed around 200 pounds, was six feet tall and was very active for his age. (T. 291).

The victim had received a Timex watch from his daughter on Father's Day in 1975, which he wore regularly. It had easy to read numerals and a "black plastic band". The victim's daughter notified the police that it was missing. (T. 398-340) (State's Exhibit No. 7).

A consent search on December 11, 1975 of the house occupied by Mary Caruth and the Petitioner, Henry Drake, in Madison, Georgia, turned up the victim's Timex watch (State's Exhibit No. 7), in a dresser drawer at the house. The watch was examined by a G.B.I. agent and found to have blood on it. (T. 254). Mr. Eberhart's daughter identified the watch (State's Exhibit No. 7), as being the watch she had given to her father and testified that the watchband looked like the band on the watch her father wore regularly. (T. 401-402, State's Exhibit No. 8).

Mary Caruth testified that she, the Petitioner, and Mr. Campbell, lived together in Culbert, Georgia in a two bedroom house and that the three of them moved from Culbert to Madison, Georgia. (T. 377). On the evening that Mr. Eberhart was killed, the three of them went to Culbert and let Mr. Campbell out to go to the barber shop. (T. 379). Ms. Caruth testified that she and the Petitioner went to Drake's mother's house where they stayed until "five minutes until 10:00 p.m." and Ms. Caruth testified that they then went and picked Mr. Campbell back up at the laundromat across the street from the barber shop. (T. 381-382).

Ms. Caruth testified that the three of them went straight back to Madison to their house, riding together in the front seat of the car. She stated that they did not leave the house during the night but that the following morning, she and the Petitioner went back over to his mother's house in Culbert. (T. 383). Ms. Caruth testified that she heard that Friday night that Mr.

Eberhart had been beaten up with a hammer on the 9:30 to 10:00 p.m. radio news. (T. 388).

At one point, Ms. Caruth testified that she had not seen Mr. Campbell when he left their house in Madison, Georgia, on the next Saturday, but later testified that Mr. Campbell had a gun and threatened to kill her if the Petitioner did not drive him from Madison. (T. 386). She testified that Campbell held the gun to her head and that she heard Campbell tell the Petitioner, "I believe I killed a man."

However, Ms. Caruth's testimony did implicate the Petitioner in the crime because she testified that the Petitioner had a knife with black handles and a tree-shaped figure on it. (T. 390). This description fit one of the knives found in the barber shop.

William Campbell testified against the Petitioner. He stated that he knew the Petitioner and Ms. Caruth and they all lived together for a month or two in Culbert, Georgia, and then moved to Madison, Georgia. (T. 157-158). He stated that at about 5:00 p.m. on December 5, 1975, the three of them drove from Madison to Culbert so that he could get a hair cut in a small barber shop located in a brick building across from the laundromat. (T. 160-162). When asked if he saw the Petitioner at the barber shop, Mr. Campbell did not answer until the question was repeated three times, at which time he stated, "I ain't got nothing to say about that." (T. 165-166). However, the court instructed the witness to answer the question and he testified that he saw the Petitioner enter the barber shop when it was getting dark. (T. 167). Mr. Campbell stated that he was getting his hair cut and did not recognize the Petitioner when he came in, because he had a wig on his head. (T. 168). Mr. Campbell stated that the Petitioner told the victim that he "was gonna rob him and take his money" and that he then hit the barber with a hammer. (T. 168).

Mr. Campbell stated that he told the Petitioner not to hit the old man and to leave him alone, at which point Petitioner hit him with the hammer. (T. 169). Mr. Campbell testified that the Petitioner hit the barber more than one blow with the hammer. He further testified that he saw some knives at the barber shop. (T. 171). Mr. Campbell observed the Petitioner taking something out of the pockets of the victim. (T. 174). Mr. Campbell stated that they remained at the barber shop about ten to fifteen minutes and that although he had gotten some blood on himself during this time, he washed it off and then returned to Madison. (T. 172-173).

Mr. Campbell identified the victim's watch and stated that Henry Drake had it. The Petitioner did not have it before the murder and robbery but Mr. Campbell saw him wearing it the next morning. (T. 173; 183). Mr. Campbell also stated that the Petitioner had a hammer that night and that he had hit him and the victim with it. Later, Mr. Campbell had picked up this hammer and threw it in a truck parked at the barber shop. (T. 175).

Mr. Campbell stated that Mary Caruth was behind the barber shop during the incident there. Their car was parked at a store and after the crimes at the barber shop, they all got in the car and left together, driving to a graveyard and drinking beer. (T. 176-177). Mr. Campbell stated that he went to sleep and when he woke up they were back in Madison. (T. 178). Beer bottles fitting the description given by Campbell, were found by the sheriff and a G.B.I. agent in the cemetary in Culbert. (T. 317-318; 323).

Campbell testified that the morning after the crimes, Ms. Caruth and the Petitioner went to Culbert. Upon their return, they told him he had to leave Madison and took him to Atlanta,

letting him out on Peachtree Street and giving him a $20.00 bill. (T. 179-180).

On cross-examination, Mr. Campbell testified that he tried to pull the Petitioner off the victim. The victim reached up and pulled the wig from Petitioner's face, stating, "Lords sakes, I didn't think you would do that." (T. 208). Mr. Campbell also stated that neither he nor the Petitioner had any money the Friday afternoon before the robbery. (T. 237).

G.B.I. Agent Stone testified as to a statement that the Petitioner had made prior to his arrest in which the Petitioner claimed that he had let Mr. Campbell out at the barber shop to get a hair cut and that he and Mary Caruth had gone to his mother's house and stayed about two hours, later coming back and picking up Mr. Campbell in front of the Laundromat. (T. 342). The Petitioner also took the stand in his own defense at the trial and made a similar statement to the jury.

Further facts will be developed as is necessary for a more thorough understanding of any issues raised by this petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE STATE HABEAS CORPUS COURT PROPERLY HELD THAT PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE PURSUANCE OF ALLEGEDLY INCONSISTENT THEORIES IN THE PROSECUTION OF PETITIONER AND HIS CO-PERPETRATOR.

Petitioner asserts that the State took a contradictory approach in their prosecution of the Petitioner and his co-perpetrator, William Campbell, thereby breaching the prosecutorial obligation of good faith and resulting in a denial of Petitioner's right to a fair trial. The state habeas corpus court considered this claim and although finding that the State pursued inconsistent approaches in these two cases, found that if anyone had a right to complain that their rights were violated in this regard, it was the Petitioner's co-perpetrator and not the Petitioner. The state habeas corpus court properly found that no prejudice resulted to the Petitioner from an allegedly earlier inconsistent approach taken by the State in the Campbell case.[1/]

While the state habeas corpus court recognized the constitutional issue involved, it also recognized that the Petitioner was not the

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1/ The State is not willing to concede that inconsistent approaches were taken in the case of the co-perpetrator, but rather would reiterate to this Court what was asserted at the state habeas corpus hearing, that the prosecution of the two cases was not inconsistent, as both the Petitioner and Mr. Campbell were, in the State's view, equally culpable in the armed robbery and murder of Mr. C. E. Eberhart. The fact that Mr. Campbell was in poor health and perhaps could not have completed these crimes alone, does not in any way lessen either his culpability or that of the Petitioner, as the State has consistently asserted that both the Petitioner and Mr. Campbell were equally involved and equally culpable. The fact that Mr. Campbell asserted at Mr. Drake's trial that he was not involved, but was merely present, does not affect the State's position, taken during Mr. Campbell's trial, that he was equally culpable with the Petitioner.

proper party to assert this constitutional right as, no prejudice resulted to him from the fact that the State allegedly pursued the theory that Mr. Campbell had committed the crimes in his case, while asserting in the Petitioner's trial, that although Mr. Campbell was present, Mr. Drake actually committed the crimes. As can be seen from the Statement of the Case portion of the brief, Mr. Campbell testified at the Petitioner's trial, and provided direct evidence of his guilt. As Petitioner has shown no prejudice resulting from any constitutional right which may have been violated, there is no federal question presented to this Court for its review.

B. THE STATE HABEAS CORPUS COURT PROPERLY FOUND, IN ACCORDANCE WITH THE DECISION OF THE SUPREME COURT OF GEORGIA, THAT PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE PROSECUTOR'S CLOSING ARGUMENT DURING THE PENALTY PHASE.

The Petitioner argues that his rights to due process were denied because during the prosecutor's closing argument in the penalty phase of his trial, the prosecutor quoted from the Georgia cases of Eberhardt v. State, 47 Ga. 598 (1873) and Hawkins v. State, 25 Ga. 207 (1858).

The state habeas corpus court in examining this contention made by the Petitioner, noted that the Georgia Supreme Court had already ruled on this issue. The Georgia Supreme Court noted that state law in Hawes v. State, 240 Ga. 327, 336 (1977), had outlawed the practice of reading from such cases as Eberhart v. State, supra, to persuade a jury to impose the death penalty. However, the Georgia Supreme Court noted that as in the case of Petitioner's co-perpetrator, the prosecutor had not been reading from these cases in addressing the jury, but rather was addressing the court. Drake v. State, 241 Ga. 583, 587 (1978). The Georgia Supreme Court stated, "We held in Campbell that the presence of the jury during such arguments did not bring the argument within the scope of Hawes, though it would be preferable if such argument were conducted outside of the jury's presence." The Georgia Supreme Court also found that a brief reference to Gary Gilmore in the prosecutor's closing argument was also made

to the trial court and was therefore not likely to inflame the passions or prejudices of the jury.

The state habeas corpus court found this contention to be without merit, as the Supreme Court of Georgia had rendered an adverse ruling to the Petitioner in connection with this issue.

The record shows that the district attorney prefaced his reference to Hawkins v. State, 25 Ga. 207 (1857), with the statement, "If Your Honor please, in connection, in my urging you to submit this to the jury. . . ." (T. 513). Similarly, the district attorney prefaced his reference to Eberhardt v. State, 47 Ga. 598, 610 (1873), with the statement, "If Your Honor please . . . ." (T. 513).

It should also be noted that the trial transcript reflects that counsel for the Petitioner did not object to this portion of the charge until after the closing statements had been concluded and the jury had retired. (T. 525-526). However, the trial court offered to recall the jury and have them recharged, but counsel for the Petitioner stated that he had rather, "leave it like it is." (T. 528).

In finding this contention to be without merit on Petitioner's direct appeal to the Supreme Court of Georgia, that court noted its decision in Presnell v. State, 241 Ga. 49, 62 (1978), in which the court held that this type of argument may in fact be harmless error. As the Georgia Supreme Court has properly interpreted state law and as the state habeas corpus court properly followed the ruling of the highest court within the state, this case involves merely an interpretation of state law and presents no federal question for this Court's review.

C. GA. CODE ANN. § 27-2534.1 (b)(7) IS NOT OVERLY BROAD AND VAGUE AS APPLIED TO THE FACTS PRODUCED AT PETITIONER'S TRIAL.

Petitioner argues that the statutory aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7) is overly broad and vague so as to render Petitioner's death sentence based upon this aggravating circumstance, unconstitutional. The jury at Petitioner's trial found the existence of the statutory aggravating circumstance set forth in Ga. Code Ann. § 27-2534.1 (b)(7), i.e., that the offense of murder was outrageously and wantonly vile, horrible and inhuman, in that it involved torture, depravity of mind and an aggravated battery to the victim. However, as noted by the state habeas corpus court, the jury also found the existence of an additional statutory aggravating circumstance as set forth in Ga. Code Ann. § 27-2534.1(b)(2), i.e., that the offense of murder was committed while the defendant was engaged in the commission of another capital felony, i.e., the armed robbery of C. E. Eberhart. (T. 529). Therefore, even on this basis, this case can instantly be distinguished from the facts of Godfrey v. Georgia, 27 Cr. L. 3115, decided May 19, 1980, in which this Court considered whether or not the statutory aggravating circumstance contained in Ga. Code Ann. § 27-2534.1 (b)(7), was unconstitutional as applied to the facts of that particular case.

This Court held in Godfrey v. Georgia, supra, that the validity of Mr. Godfrey's death sentences turned on whether, in light of the facts and circumstances of the murders that Mr. Godfrey had been convicted of committing, the Georgia Supreme Court applied a constitutional construction of the phrase "outrageously or

wantonly vile, horrible or inhuman, in that they involved depravity of mind." The court concluded that in that case the phrase had been unconstitutionally applied. However, this Court noted in Godfrey v. Georgia, that this particular statutory aggravating circumstance was found not to be unconstitutional on its face in the court's own decision in Gregg v. Georgia, 428 U.S. 153 (1976).

Examining the facts and circumstances of the instant case, it is apparent that this statutory aggravating circumstance was properly found by the jury and properly applied to the facts and circumstances of this case. In addition to the evidence produced at trial referred to in Part I of this brief, it should be noted that Dr. Joseph P. Williams, a neurological surgeon, testified that the victim had multiple injuries, including a stab wound to his right chest and multiple head injuries. He stated that the victim had multiple places where the skull had been crushed and pushed into his brain. (T. 149-150). Dr. Williams testified that the victim had a wound on his right forehead and that his eyes were completely swollen shut. Dr. Williams testified extensively about the numerous wounds to the head and stated that one wound in the left frontal area revealed that the bone and skull had been crushed into the brain and the eye. (T. 151). Dr. Williams testified that these types of injuries would occur as the result of being hit with a very hard, blunt object. (T. 152). He also testified that these wounds were consistent with those that could be inflicted by a claw hammer. (T. 152). Dr. Williams testified as to the extensive surgery to the brain which was necessary and testified that on March 23, 1976, the victim died from multiple injuries to the brain. (T. 155). This was, of course, several months after Mr. Eberhart had been beaten and robbed in his barber shop. As previously noted, Sheriff Fortson who discovered the body testified that in the top portion

of Mr. Eberhart's forehead there was a wound which one could almost "lay your fist in." (T. 307). As noted by the Georgia Supreme Court, the victim was over 70 years old at the time of the commission of the crimes.

Respondent contends that examining the facts and circumstances of the instant case, it is apparent that this particular statutory aggravating circumstance was properly found by the jury and also properly applied to the facts and circumstances of this case. The Georgia Supreme Court properly concluded that this aggravating circumstance as well as the additional circumstance was supported by the evidence. Drake v. State, 241 Ga. 583, 588 (1978). As the state habeas corpus court properly noted, even should this Court determine that this particular aggravating circumstance is unconstitutionally applied in the instant case, this would not provide grounds for any relief to the Petitioner, because of the fact that an additional aggravating circumstance was used to authorize the imposition of the death penalty. This contention by the Petitioner presents nothing which need be reviewed by this Court at this time.

D. THE STATE HABEAS CORPUS COURT PROPERLY APPLIED SANDSTROM V. MONTANA, ___ U.S. ___, 61 L.Ed. 2d 39 (1979), AS PROHIBITING CONCLUSIVE PRESUMPTIONS.

Petitioner contends that the trial court's instruction that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act" had the effect of shifting the burden of proof on the question of malice to the Petitioner so that the State was no longer forced to prove malice beyond a reasonable doubt. Petitioner contends that the state habeas corpus court improperly interpreted this Court's decision in Sandstrom v. Montana, supra, to apply only where the charge creates a conclusive presumption. The charge in Sandstrom v. Montana, was objected to on the same basis as Petitioner now seeks to attack the charge given at his trial. Defense counsel in Sandstrom, objected to the instruction on the basis that it would shift the burden of proof on the issue of purpose or knowledge to the defendant and that this would be a violation of due process under the federal constitution. This Court proceeded to find that this instruction was unconstitutional, because the jury might have interpreted the challenged presumption as conclusive or as shifting the burden of persuasion and because either interpretation would have violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. This Court noted that the juror's in Sandstrom's case were merely told, "the law presumed that a person intends the ordinary consequences of his voluntary acts", and that the jury was not told that they had a choice or that they might infer such a conclusion, but were merely told that the law presumed it.

Additionally, this Court observed that in Sandstrom, the jurors were not told that the presumption could be rebutted by the defendant's presentation of "some evidence", nor even that it could be rebutted under any circumstances. Based on this reasoning, the Supreme Court found that a reasonable juror could have interpreted the presumption as being "conclusive."

The instruction given in this case cannot be viewed in isolation and Petitioner has failed to cite all the material portions of this charge which are necessary to construe the meaning that reasonable jurors would have given this charge during Petitioner's trial. The pertinent portions of the trial court's charge on intent read as follows:

> "Ladies and Gentlemen, I charge you that a criminal intent is a material and necessary ingredient in any criminal prosecution. I charge you that the acts of a person of sound mind and discretion are presumed to be the products of a person's will and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but both of these presumptions may be rebutted. I charge you, however, that a person will not be presumed to act with criminal intent but the trials [sic] of fact may find such intent from consideration of the words "conduct, demeanor, motive and all other circumstances connected with the act to which the accused is here prosecuted. You are the triers of the fact; therefore, it is a question of

fact solely for your determination as to whether or not there was a criminal intent on the part of the defendant, considering the facts and circumstances as disclosed by the evidence and deducting the deductions which might reasonably be drawn from these facts and circumstances. Now while a criminal intention may be proven in more than one way, the question of whether the defendant did act with criminal intention is finally and always a question for you, the jury, to determine."

(T. 484-485).

Respondent submits that the fact that the jury was specifically informed that this was a rebuttable presumption and were told that a person will not be presumed to act with criminal intention, negates any finding that a reasonable juror would have interpreted the challenged presumption as being conclusive or as shifting the burden of persuasion to the Petitioner.

The state habeas corpus court's decision was not in error, as that court stated that it was the conclusiveness of the presumption in Sandstrom that offended the constitution. This is a true statement. The fact that the charge might also have been unconstitutional as being susceptible to interpretation as shifting the burden of persuasion, is just an additional reason why such charges as those in Sandstrom, were outlawed. The state habeas corpus court does not hold that the charge must create a conclusive presumption in order to be burden-shifting under Sandstrom v. Montana. The court only stated that the conclusiveness of the presumption was found in Sandstrom to offend constitutional principles.

As the state habeas corpus court properly interpreted this Court's decision in Sandstrom v. Montana, and as the charge given in this case is clearly distinguishable from that examined by this Court in Sandstrom, this contention by the Petitioner presents nothing for review by this Court.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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